Supreme Court, U.S.
FILED
OCT 21 2002
OFFICE OF THE CLERK

No. 02-121

In The
# Supreme Court of the United States

JOSEPH KLAUSER, Warden,

*Petitioner,*

v.

WILLIAM L. GRAY,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT WILLIAM L. GRAY'S BRIEF IN OPPOSITION TO JOSEPH KLAUSER'S PETITION FOR WRIT OF CERTIORARI

MAYNARD D. GRANT
*Counsel of Record*

GRANT & NEWCOMB LLC
PMB 150
3213 W. Wheeler Street
Seattle, Washington 98199
(206) 286-0121

*Counsel for Respondent William L. Gray*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

Respondent William L. Gray was convicted of two counts of first-degree murder in the deaths of his wife, Betty Gray, and her friend, Reeda Roundy. The state trial court admitted, pursuant to Idaho's residual hearsay rule, hearsay statements of Betty Gray offered by the prosecution to establish that Gray had a motive to kill his wife. The trial court excluded hearsay statements by Roundy that a former boyfriend had stalked her and threatened to kill her, which the defense offered to establish that Roundy's ex-boyfriend had a motive for the killings. In so doing, the trial court imposed a different evidentiary standard than it used to allow Betty Gray's statements under the residual clause. The Ninth Circuit found that Roundy's hearsay statements were of "similar import and character" to Betty Gray's statements and would have been admitted under the residual hearsay clause if the trial court had imposed the same evidentiary standard to Roundy's statements that it had for Betty Gray's statements. The Ninth Circuit held that the trial court's "asymmetrical application of evidentiary standards," which resulted in the arbitrary exclusion of evidence that was "material, trustworthy and important" to Gray's defense, violated Gray's constitutional right to present his defense. Petitioner has presented two questions:

1. **Is a comparison of different evidentiary rulings by a state court, to determine whether state evidentiary rules have been applied in "an arbitrary or uneven way," effectively a review for evidentiary error and, therefore, beyond the scope of federal habeas corpus jurisdiction?**

**QUESTIONS PRESENTED** – Continued

2. **May a state trial court, consistent with a criminal defendant's constitutional right to present evidence, exclude speculative and untrustworthy hearsay evidence of a third party's guilt?**

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE WRIT | 5 |
| I. PETITIONER HAS FAILED TO ARTICULATE A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT | 5 |
| A. The Ninth Circuit's Ruling Is In Accord With This Court's Precedents Establishing A Criminal Defendant's Right To Present A Defense And To Present Witnesses On His Behalf, And Does Not Represent An Expansion Of Federal Habeas Jurisdiction | 6 |
| B. There Is No Split Of Authority Among The Federal Circuit Courts Of Appeals | 11 |
| C. The Opinion Below Will Not Work A Hardship On The State Courts | 22 |
| CONCLUSION | 23 |

# TABLE OF AUTHORITIES

Page

CASES

*California v. Trombetta*, 467 U.S. 479 (1984).....7, 8

*Chambers v. Mississippi*, 410 U.S. 284 (1973) ....7, 8, 10, 14

*Cikora v. Dugger*, 840 F.2d 893 (11th Cir. 1988) .....18, 20

*Cool v. United States*, 409 U.S. 100 (1972).....10

*Crane v. Kentucky*, 476 U.S. 683 (1986) .....7, 8, 15

*DiBennedetto v. Hall*, 272 F.3d 1 (1st Cir. 2001) *cert. denied*, ___ U.S. ___, 122 S.Ct. 1622 (2002).....16, 17, 20

*Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) ..... 6

*Estelle v. McGuire*, 502 U.S. 62 (1991) ..... 6

*Green v. Georgia*, 442 U.S. 95 (1979)..... 9

*In re Oliver*, 333 U.S. 257 (1948) .....7, 8

*Lewis v. Jeffers*, 497 U.S. 764 (1990) ..... 6

*Matthews v. Price*, 83 F.3d 328 (10th Cir. 1996).....17

*Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)..... 8

*Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983) ...14, 15, 18, 19

*Rock v. Arkansas*, 483 U.S. 44 (1987).....7, 8, 9, 15

*Strickland v. Washington*, 466 U.S. 668 (1984)..... 7

*Taylor v. Illinois*, 484 U.S. 400 (1988) .....7, 8

*Thomas v. Hubbard*, 273 F.3d 1164 (9th Cir. 2001) .....12

*United States v. Camuti*, 78 F.3d 738 (1st Cir. 1996).....16

*United States v. Patrick*, 248 F.3d 11 (1st Cir.), *cert. denied*, ___ U.S. ___, 122 S.Ct. 620 (2001).....16, 20

TABLE OF AUTHORITIES – Continued

Page

*United States v. Scheffer*, 523 U.S. 303 (1998) ..... 15

*United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) ..... 7, 15

*United States v. Vallejo*, 237 F.3d 1008 (9th Cir.), *amended*, 246 F.3d 1150 (9th Cir. 2001) ..... 12

*United States v. Wilson*, 160 F.3d 732 (D.C. Cir. 1998), *cert. denied*, 528 U.S. 828 (1999) ..... 19, 20

*Washington v. Texas*, 388 U.S. 14 (1967) ..... 7, 8, 10, 14

*Webb v. Texas*, 409 U.S. 95 (1972) ..... 7, 8, 9

U.S. CONSTITUTIONAL PROVISIONS

Compulsory Service Clause, 6th Amendment ..... 7, 8, 10, 11, 16, 23

Due Process Clause, 14th Amendment ..... 7, 10, 11, 23

STATUTES

28 U.S.C. §2254 ..... 6

Rule 803(3), Idaho Rules of Evidence ..... 1, 3, 4

Rule 803(24), Idaho Rules of Evidence ..... *passim*

SUPREME COURT RULES

Sup. Ct. R. 10 ..... 5

OTHER AUTHORITIES

1A John Henry Wigmore, *Evidence in Trial at Common Law* §139 ..... 12

## STATEMENT OF THE CASE

Respondent William L. Gray was convicted in 1993 of two counts of first degree murder and one count of burglary in the deaths of his wife of 29 years, Betty Gray, and her friend, Reeda Roundy. [Pet'r App. p.1] The trial court, which retained a residual doubt as to Gray's guilt, refused the State's request for imposition of the death penalty, and sentenced Gray to life in prison. [Pet'r App. 36-37]

It was the prosecution's theory that Gray killed his wife because he had learned that she was having an affair and that she wanted to divorce him. Under the prosecution's theory, Betty Gray was the targeted victim and Roundy was an incidental victim. To establish a motive for Gray to kill his wife, the State sought to introduce, through Betty Gray's sister, hearsay statements of Betty Gray that Gray was aware that his wife was having an affair, that she wanted a divorce, and that Gray wanted to keep the divorce secret. [Pet'r App. pp. 2-3, 6]

The trial court ruled that the statements were inadmissible under Idaho's state of mind exception to the hearsay rule, Rule 803(3), but admitted the statements under the hearsay residual clause, Rule 803(24), finding that the statements bore particular guarantees of trustworthiness. [Pet'r Pet. pp. 6-7]

It was the defense's theory that Gray did not commit the crimes and therefore someone else did. The defense theorized that Reeda Roundy was the targeted victim and that Betty Gray was an incidental victim who was in the wrong place at the wrong time. The defense thus sought to develop additional suspects who might have a motive for killing Roundy. Soon after the murders, four individuals, consisting of Roundy's son, her daughter, her lover and a

close friend, came forward and notified police of one such suspect, a man named J.W. Dyer. According to the four individuals, Roundy had repeatedly stated that Dyer, a former lover whom she had described as "a mercenary," had stalked her and threatened to kill her. Roundy told the four individuals that she lived in fear of Dyer and that they should notify the police about Dyer if something should happen to her. [Pet'r App. pp. 3, 6, 95-96]

To establish a motive for Dyer to kill Roundy, the defense sought to introduce Roundy's statements regarding her fear of Dyer and the factual reasons for that fear. The trial court ruled that Roundy's statements were inadmissible under the state of mind exception because they were not material, and hence, not relevant, under Idaho. The court then ruled that because the statements were not relevant under the state of mind exception, they were not eligible for admission under Rule 803(24), the hearsay residual clause. The trial court did not address whether Roundy's statements bore particular guarantees of trustworthiness. The trial court ruled that all of Roundy's statements were inadmissible. [Pet'r App. pp. 7-8]

The Idaho Court of Appeals affirmed the trial court's hearsay rulings on an abuse of discretion standard, finding that the trial court was entitled to find that the statements offered by the prosecution bore particularized guarantees of trustworthiness, while those statements offered by the defense did not. [Pet'r App. pp. 13-14] However, as the Ninth Circuit found, the trial court did not base its rulings on any concern about the trustworthiness of the proffered defense statements. Rather, the reasons the trial court gave for rejecting the hearsay statements offered by Gray were that (1) the evidence was

not material to the case and (2) because the evidence did not qualify for admission under Idaho's state of mind hearsay exception, Rule 803(3), it also did not qualify for admission under the residual clause, Rule 803(24). [Pet'r App. pp. 14-18] The Idaho Supreme Court denied further review, and Gray filed a petition for writ of certiorari which this Court denied. Gray then filed a petition for writ of habeas corpus in the United States District Court in Idaho. That court denied Gray's habeas corpus petition, and Gray appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit found that "the trial court indubitably applied Idaho's residual hearsay exception arbitrarily and unevenly," and "used two completely different analytical frameworks" when considering the prosecution's and defense's hearsay evidence under Rule 803(24), which "resulted in diametrically opposite rulings: While the trial court rejected the defense's hearsay evidence, it admitted substantially parallel hearsay evidence submitted by the prosecution." [Pet'r App. p. 24] The court below found that the trial court's hearsay analysis under Rule 803(24) "diverged in at least three significant ways," depending on whether it was considering hearsay evidence offered by the prosecution, or hearsay evidence offered by the defense.

First, while the trial court specifically considered and determined that facts contained within Betty Gray's hearsay statements were material to the prosecution's case, it failed to consider the facts of the Roundy hearsay statements separate from the state of mind facts, and rejected them summarily for lack of materiality "with no pertinent analysis or explanation" for its decision. [Pet'r App. pp. 24-25]

Second, the trial court gave preclusive effect to its findings under Rule 803(3) when it considered the defense's evidence but not when it considered the prosecution's. That is, once the court determined that the prosecution's statements did not fall within the state of mind exception, it shifted its analytical framework to whether the statements bore particularized guarantees of trustworthiness for admission under Rule 803(24). In contrast, once the court determined that the defense's statements did not fall within the parameters of Rule 803(3), it did not then proceed to determine whether the statements bore the particular guarantees of trustworthiness requisite for admission under Rule 803(24). Instead, the court gave preclusive effect to its state of mind ruling. That is, because the statements were not relevant under Rule 803(3), they were *per se* not admissible under Rule 803(24). [Pet'r App. pp. 25-26]

The third and final way that the trial court's analytical framework under Rule 803(24) differed depending on the identity of the party offering the hearsay was that the trial court included a pro-admissibility factor in its analysis only when considering the admissibility of the evidence submitted by the prosecution. In admitting the prosecution's hearsay statements, the court consistently gave weight to the factor that "the interests of justice are best served when the jury is presented with as much information as possible about the case." Without any explanation as to why, the trial court failed to weigh this factor when considering hearsay testimony offered by the defense. [Pet'r App. pp. 26-27]

The Ninth Circuit found that the trial court "applied entirely divergent analyses and came to irreconcilable results regarding the substantive admissibility of the

out-of-court statements by the two victims." [Pet'r App. p. 27] This "asymmetrical application of evidentiary standards" resulted in the arbitrary exclusion of evidence that was "material, trustworthy and important" to Gray's defense, and violated Gray's constitutional right to present his defense. [Pet'r App. p. 13]

Finding, as did the trial judge, that the State's evidence linking Gray to the crimes was "minimal," "equivocal," and almost "entirely circumstantial,"and suffered from an "overall weakness," [Pet'r App. pp. 34-35, 39] the Ninth Circuit had "no difficulty" [Pet'r App. p. 34] in holding that the preclusion of Roundy's statements, which quarantined the jury from material evidence inculpating another suspect in the murders, was not harmless, and ordered that the writ of habeas corpus be granted. [Pet'r App. p. 43]

## REASONS FOR DENYING THE WRIT

### I. PETITIONER HAS FAILED TO ARTICULATE A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* The State has failed to present any compelling reason for this Court to exercise its discretionary jurisdiction in this case.

### A. The Ninth Circuit's Ruling Is In Accord With This Court's Precedents Establishing A Criminal Defendant's Right To Present A Defense And To Present Witnesses On His Behalf, And Does Not Represent An Expansion Of Federal Habeas Jurisdiction.

The State argues that a writ of certiorari should issue because the Ninth Circuit's ruling represents "a significant expansion of constitutional analysis of a defendant's right to present evidence that is not supported by this Court's decisions." [Pet. pp. 5-6] To the contrary, the Ninth Circuit's decision falls squarely within the main of the Court's habeas jurisprudence regarding the arbitrary application of state evidentiary rules, and provides the Court with no basis for granting the writ.

As a general rule, federal habeas actions do not lie to review questions regarding the admissibility of evidence under state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). However, federal habeas review is appropriate to determine whether the error constituted a violation of a specific constitutional right of the defendant, or "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

Under the habeas corpus statutes, a federal court can issue a writ of habeas corpus for a claim adjudicated in state court only if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). The Ninth Circuit held that the trial court's asymmetrical application of evidentiary standards, and

the rulings generated thereby, resulted in a decision "that was contrary to" this Court's precedents on the right of a criminal defendant to present a defense and to call witnesses on his behalf. [Pet'r App. p. 19]

In so doing, the Ninth Circuit relied upon two principles of constitutional law that are clearly established by this Court's precedents. "First, a state rule or ruling may not arbitrarily deprive a defendant of his right to present a defense or his right to present witnesses on his behalf. Second, a state rule or state judge may not without justification impose stricter evidentiary standards on a defendant desiring to present a witness' testimony than it does on the prosecution." [Pet'r App. pp. 19-20.] These constitutional rules derive from over a half-century of Supreme Court precedent establishing the fundamental nature of a criminal defendant's right to present a complete defense to the jury and to call witnesses on his or her behalf.

The right to present a defense and to call witnesses on one's behalf emanates from the Sixth Amendment, *see Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); the Due Process Clause of the Fourteenth Amendment, *see Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Webb v. Texas*, 409 U.S. 95, 97 (1972); *In re Oliver*, 333 U.S. 257, 273 (1948); or both, *see Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *Washington v. Texas*, 388 U.S. 14, 17-18 (1967).

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Service

Clause of the Sixth Amendment, the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (*quoting California v. Trombetta*, 467 U.S. 479, 485 (1984). In discussing the Compulsory Service Clause, the Court has held that "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).

As Justice Black proclaimed in *In re Oliver*, a defendant's "right to his day in court" is "basic in our system of jurisprudence" and includes "as a minimum, a right to examine the witnesses against him, *to offer testimony*, and to be represented by counsel." 333 U.S. at 273 (emphasis added). A defendant's right to present a defense is fundamental in nature and is firmly imbedded in the jurisprudence of this Court. *Crane*, 476 U.S. at 687; *Trombetta*, 467 U.S. at 485; *Webb*, 409 U.S. at 98; *Washington*, 388 U.S. at 19. The right includes the right to present witnesses as part of that defense. *Rock v. Arkansas*, 483 U.S. at 55; *Taylor*, 484 U.S. at 408; *Chambers*, 410 U.S. at 294; *Webb*, 409 U.S. at 98; and *Washington*, 388 U.S. at 19.

A state court may violate a defendant's right to present a defense and to call witnesses in his behalf by applying evidentiary standards in an arbitrary or uneven manner. In *Washington*, this Court held that a state evidentiary rule that prevented an accomplice from testifying on behalf of a defendant, but not on behalf of the state, arbitrarily denied the defendant's right to offer testimony of witnesses. *Id.*, 388 U.S. at 22. In *Rock*, this Court held

that a state rule barring all hypnotically refreshed testimony was an arbitrary infringement of the defendant's right to testify, noting that a state "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Id.*, 483 U.S. at 55-56.

In addition, a state court cannot, within constitutional limits, apply evidentiary standards in an unjustified and uneven way that favors the prosecution over the accused. For example, in *Green v. Georgia*, 442 U.S. 95, 97 (1979), this Court found that the defendant was denied a fair trial where state evidentiary rules barred the defendant from presenting exculpatory hearsay testimony that was relevant to a critical issue, but allowed the prosecution to use the same testimony to secure a conviction against a co-defendant. In *Webb v. Texas*, 409 U.S. 95 (1972), this Court held that the defendant's due process rights were violated when the trial court warned a defense witness that he faced perjury charges if he lied under oath, but failed to deliver the same admonishment to the prosecution's witnesses. In *Washington*, this Court held that a state rule which allowed an accomplice to testify for the prosecution but not for the defendant ran afoul of the defendant's right to present his defense. Said the Court, 388 U.S. at 14:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own

> witnesses to establish a defense. This right is a fundamental element of due process of law.

In concurrence, Justice Harlan noted that the application of different rules to the prosecution and to the defense is contrary to the Due Process Clause, and stated that a state may not recognize as relevant and competent the testimony of a certain category of witness but arbitrarily bar use of the same kind of testimony by the defendant. *Id.* 388 U.S. at 24-25. In *Chambers*, this Court held unconstitutional a state evidentiary rule which barred a defendant from impeaching his own witness but did not similarly bar the prosecution from impeaching the witness. And, in *Cool v. United States*, 409 U.S. 100, 103 n. 4 (1972), this Court reversed a conviction where the jury was instructed that while it could convict solely on the basis of accomplice testimony, it could not acquit on the same basis.

These cases stand for the proposition that a state court may violate a defendant's right to present a defense and to call witnesses on his behalf when it applies state evidentiary rules in an arbitrary, unjust or uneven way or in a manner which arbitrarily imposes stricter evidentiary standards on the defense than it does on the prosecution.

Applying this Court's precedents to the present facts, the Ninth Circuit found that the trial court's asymmetrical application of evidentiary standards, which resulted in the admission of the State's hearsay motive evidence and in the arbitrary exclusion of Gray's hearsay motive evidence, violated Gray's constitutional right to present a defense as secured to him by the Compulsory Service Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Seen in its true light, the egregious action of which the State complains is nothing more

than the straightforward application of this Court's precedents to the uncontroverted facts of this case.

The trial court "applied entirely divergent analyses and came to irreconcilable results regarding the substantive admissibility of the out-of-court statements by the two victims." This "asymmetrical application of evidentiary standards" resulted in the arbitrary exclusion of evidence that was "material, trustworthy and important" to Gray's defense, and violated Gray's constitutional right to present his defense. The Ninth Circuit's decision is in accord with the precedents of this Court and does not represent an expansion of federal habeas jurisdiction. It provides no basis for the exercise of this Court's discretionary jurisdiction. The petition for writ of certiorari should be denied.[1]

### B. There Is No Split Of Authority Among The Federal Circuit Courts Of Appeals.

The State argues that the decision of the Ninth Circuit is in conflict with decisions of the Courts of Appeals for the First, Tenth, Eleventh and D.C. Circuits.

---

[1] The State claims that the decision below will work a hardship on state judicial systems because it "brings virtually all evidentiary rulings by state courts that exclude evidence offered by a criminal defendant under the umbrella of constitutional scrutiny because it elevates the question of whether a trial court consistently applied evidentiary rules to constitutional significance." [Pet. p. 6] It suffices to say that the only state courts that will be troubled by the decision below are those which violate the Sixth and Fourteenth Amendments to the federal constitution by arbitrarily limiting a defendant's right to present a defense. There is nothing novel in this regard in the Ninth Circuit's opinion. The Ninth Circuit has not changed the constitutional analysis of this Court. It has simply applied that analysis to the facts of this case.

[Pet. pp. 17-22] The claim is based upon the Ninth Circuit's observation that "[e]vidence that someone other than the defendant may have committed the crime is *critical* exculpatory evidence that the defendant is entitled to adduce," *quoting Thomas v. Hubbard*, 273 F.3d 1164, 1177 (9th Cir. 2001), and the further observation that such evidence does not lose its value to the defendant merely because "the defense theory is purely speculative," as "it is the role of the jury to consider the evidence and determine . . . whether it presents legitimate alternative theories for how the crime occurred," *quoting United States v. Vallejo*, 237 F.3d 1008, 1023 (9th Cir. 2001) *citing* 1A John Henry Wigmore, *Evidence in Trials at Common Law* §139.[2] [Pet'r App. p. 29]

The State complains that the Ninth Circuit has created a new evidentiary standard that is at odds with the aforementioned federal circuits and with numerous state judicial systems which require that the evidence in some way "connect" the third-party suspect to the crime with which the defendant is charged. The court below did not create a new standard and its decision is not at odds with the Circuit cases upon which the State relies.

The short answer to the State's concern is that, in the instant case, the Roundy hearsay statements *did* connect the third-party suspect to the crimes by supplying her ex-lover, Dyer, with a motive to murder her (she had spurned

---

[2] "[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should accord the accused every opportunity to create that doubt." 1A John Henry Wigmore, *Evidence in Trials at Common Law* §139.

him) and by supplying evidence that he had taken numerous affirmative actions (stalking her and threatening to kill her) which supported the motive which the defense sought to present. Necessarily, such evidence is inherently speculative in nature. The same, of course, is true of the State's hearsay evidence which the State used to speculate as to why Gray would want to kill his wife. The difference, and it is the only difference, is that the State was allowed to present its speculative hearsay to establish a motive for Gray, while the defense was prohibited from introducing its speculative hearsay evidence to establish a motive for a third party.

Notably, the trial court did not preclude the Roundy statements on grounds that they were speculative in nature or that they failed to connect Dyer to the crimes, but rather held that because the statements did not fit within Idaho's state of mind exception to the hearsay rule they were automatically precluded from consideration under the hearsay residual clause, a limitation it did not impose upon the State's evidence. It was the trial court's asymmetrical application of evidentiary standards – and not some finding based on speculation or lack of connection – which was the reason for the granting of the writ.

Had the trial court applied the same evidentiary standard under Rule 803(24) to the defense's evidence as it did to the State's, it seems reasonable to conclude, as the Ninth Circuit did, that the trial court would have admitted the evidence given its parallel materiality and attributes of trustworthiness. By the same token, had the trial court applied to the State's evidence the same truncated residual clause analysis which gave preclusive effect to the

evidence's inadmissibility under the state of mind exception, it necessarily follows that the State's evidence would have been excluded as well.

The Ninth Circuit's statement regarding speculative evidence must be read in light of its circuit history. In *Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983), the court, following this Court's lead in *Chambers* and *Washington*, adopted a balancing test to determine when a state's interest in the orderly presentation and reliability of its trials is sufficient to overcome a defendant's right to present a defense. *Id.* at 1450. *Perry* dealt with a California state evidentiary rule which had the goal of placing reasonable limits on the trial of collateral issues in order to avoid undue prejudice to the state from "unsupported" jury speculation regarding the guilt of third parties. Perry, on trial for assault, sought to introduce evidence that another individual who bore a somewhat similar physical resemblance to him had been in the area of the crime scene about an hour before the assault and had previously committed assaults. The Ninth Circuit, finding Perry's evidence "tenuous" and of "only slight probative value" on the issue of identification, ruled that the scales tipped in favor of the state's interest in excluding the identification evidence. The court stated: "The jury is the proper body to weigh conflicting inferences of fact, but there clearly is some point at which the evidence may be so lacking in probity and so productive of confusion that it may constitutionally be excluded." *Id.* at 1453-54.

The balancing test adopted in *Perry* remains the law in the Ninth Circuit. Seen through the lens of *Perry*, the court below simply made the unremarkable observation that evidence of a third-party suspect is not automatically rendered irrelevant and constitutionally immaterial

merely because it is speculative in nature. Rather, such evidence is subject to the balancing test adopted in *Perry*. As the court below duly noted, [Pet'r App. p. 28] in appropriate cases:

> A state's restriction on a defendant's right to present evidence may not rise to constitutional error if the evidence is immaterial, unimportant, or untrustworthy.
>
> * * *
>
> To establish a violation of the constitutional right to present a witness, a defendant must make a "plausible showing of how [the] testimony would have been both material and favorable to his defense." *Valenzuela-Bernal,* 458 U.S. at 867; *see also Rock*, 483 U.S. at 51; *United States v. Scheffer*, 523 U.S. 303, 315 (1998). In addition, judges may exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion. *Crane*, 476 U.S. at 689-90. (Parallel citations omitted).

In the instant matter, Gray's proffered hearsay statements did not yield to the State's interest in its evidentiary rules; they fell victim to an inexplicable and asymmetrical application of those rules by the trial court, one which allowed the State to introduce inculpatory evidence tending to prove that Gray had a motive to kill his wife, while precluding Gray from introducing exculpatory and equally trustworthy evidence to establish that a third party also had a motive to kill.

None of the Circuit cases cited by the State involved the exclusion of relevant and trustworthy evidence that was of constitutional materiality to the defense in those cases. Nonetheless, a review of those cases informs that

the State's claimed split of authority among the Circuits is imaginary.

The First Circuit, in *United States v. Patrick*, 248 F.3d 11 (1st Cir.), *cert. denied*, ___ U.S. ___, 122 S.Ct. 620 (2001), addressed the issue of whether the trial court committed reversible error by excluding testimony that consisted of "anonymous calls from tipsters" about who had committed the murder with which the defendants were charged. The First Circuit first held that exclusion was proper under the Federal Rules of Evidence because the defense wholly failed to establish that the anonymous information "was either trustworthy or exculpatory," and qualitatively compared the excluded evidence with the evidence at issue in *United States v. Camuti*, 78 F.3d 738, 742 (1st Cir. 1996), wherein the court concluded that inferential evidence sought by the defense was "so thin that [it] can barely, if at all, meet the generous test for relevance under Fed.R.Evd. 401." *Id.* at 22. Secondly, in addressing whether the exclusion violated the defendant's Sixth Amendment right to present a defense, the First Circuit held that there was no Sixth Amendment violation because the anonymous tip information "lacked the indicia of reliability of the testimony in *Chambers* [*v. Mississippi*], and, in contrast to *Chambers*, was outside the basic rationale of the exception for declarations against interest." *Id.* at 24.

In *DiBenedetto v. Hall*, 272 F.3d 1 (1st Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 1622 (2002), the First Circuit again upheld the exclusion of defense evidence of third-party suspects. There, the defendant, who was charged with murder, sought to admit evidence of unrelated murders allegedly committed by third-party suspects. The state trial court disallowed the evidence on

grounds that it was too remote and dissimilar and therefore too speculative. The First Circuit said the trial court's exclusion on the stated grounds made its decision "questionable," but upheld the exclusion because, *in addition to* the grounds cited by the state court, the record established that the only suspects the defendant could name "could not possibly have been the killers here," and the trial judge "was left only with the murky figures of unnamed mob killers, whose existence in the shadows could possibly, but not likely, be inferred from a complicated tale of murder." The First Circuit found two additional reasons: "the evidence would disparage the victims as bad people, deserving of death, and it would pose a real danger of distracting the jury from the case before it." It was only "[t]his combination of unreliability, disparagement, and the tangential nature of the evidence" that sufficed to uphold the exclusion against constitutional challenge. *Id.* at 9.

The Tenth Circuit, in *Matthews v. Price*, 83 F.3d 328 (10th Cir. 1996), the defendant, charged with acts of sexual assault, sought to introduce hearsay statements of the Cardenas boys to the effect that they had witnessed defendant's son engaging in sexual acts with the victim. The state court excluded the statements because they were not relevant to the particular charges facing the defendant and were insufficient under Colorado law to support a theory that the defendant's son was an alternative suspect. Colorado law required some showing by the defendant connecting the third-party suspect to the crime with which the defendant was charged. On appeal, the Colorado Court of Appeals upheld the exclusion because the defendant "had failed to offer sufficient evidence that [his son] had committed the sexual assaults during the

time period [defendant] was alleged to have assaulted the victims." In upholding the state court decision, the Tenth Circuit noted that the evidence established that the Cardenas boys had moved away from the neighborhood and therefore were not present in the neighborhood at the time that defendant was alleged to have committed the assaults. Moreover, the statements of the Cardenas boys indicated that the sexual acts involving defendant's son had occurred at a different location than the house in which defendant was alleged to have committed his acts. Thus, the Tenth Circuit found that the proffered hearsay was "simply not relevant in time or place to the charges against [the defendant] and therefore were not material to [his] defense."

The Eleventh Circuit, in *Cikora v. Dugger*, 840 F.2d 893, 898 (11th Cir. 1988), upheld against constitutional challenge evidence of a third-party suspect. The court noted that the "[f]ederal courts have granted relief from state convictions when the trial court arbitrarily excluded evidence tending to show that another person might have committed the crime. They have done so, however, only when there was some demonstration connecting another person to the particular crime for which the defendant was on trial." There, the defendant, who was charged with burglary, sought to have the jury view another individual who defendant claimed lived in the neighborhood where the burglary occurred and who bore a physical resemblance to a description of the burglar given by the victims. In affirming the decision of the trial court excluding the jury from viewing the third-party suspect at trial, the Eleventh Circuit, citing the Ninth Circuit's decision in *Perry*, explained

> The defendant certainly has a strong interest in presenting exculpatory evidence, but the state has an interest in promoting reliable trials, particularly in preventing the injection of collateral issues into the trial through *unsupported speculation* about the guilt of another party.

*Id.* at 898 (emphasis added). Because Cikora failed to present any showing of a nexus between the third-party suspect and the crime charged, the Eleventh Circuit held that his rights had not been violated by the exclusion of evidence amounting only to unsupported speculation. *Id.*

Finally, the District of Columbia Circuit, in *United States v. Wilson*, 160 F.3d 732 (D.C. Cir. 1998), *cert. denied*, 528 U.S. 828 (1999), excluded defense evidence of a third-party suspect, stating:

> Regardless of whether, as the government urges, evidence that a third party committed the crime is admissible only if coupled with "substantial evidence," or, as appellants argue, is admissible without a heightened showing, the district court was well within its discretion to exclude it. The court simply refused to allow testimony about an ambiguous remark by an unidentified man about whom nothing more was known. Such proffered evidence . . . is tantamount to evidence about a hypothetical suspect. We accordingly find no error.

None of the cases cited by the defense involved the asymmetrical application of evidentiary rules. None of the cases cited by the defense involved the imposition of stricter evidentiary standards on a criminal defendant than on the prosecution. Most importantly, none of the cases cited by the State involved the exclusion of reliable, trustworthy and material evidence.

These cases simply stand for the proposition that a state court may exclude evidence of a third-party suspect where the defense fails to show that the evidence is either trustworthy or exculpatory and lacks the indicia of reliability that this Court requires (*Patrick*), where the evidence is only of "murky" and "unnamed" killers, too remote and dissimilar to be connected to the offense, disparaging of the victims and distracting to the jury (*DiBenedetto*), where the evidence is simply not relevant in terms of time or place and not material to the defense (*Matthews*), where the evidence consists of "unsupported speculation" (*Cikora*), and where the evidence is akin to a "hypothetical suspect" whose existence is asked to be inferred from "an ambiguous remark by an unidentified man about whom nothing is known" (*Wilson*).

Clearly, the Roundy statements were not unsupported speculation. They were the informed, fearful statements of a woman who was actively pursued and stalked by an ex-lover who always knew where she was living and who had threatened to kill her. Roundy repeated her statements to four separate individuals, all of whom came forward and informed the police of Roundy's statements about Dyer. The prosecution admitted the statements had been made. On this record, it is clear that Roundy's statements cannot be fairly described as unsupported speculation. The requisite connection, of which the State complains loudly, is plain to see.

The trial court did not exclude the Roundy evidence because of the possibility of jury confusion, or because the evidence was speculative or untrustworthy, or because of undue prejudice to the State. The trial court never evaluated nor weighed Gray's interest in admitting the statements against the State's interest in excluding them. Its

asymmetrical application of evidentiary standards precluded any such inquiry.

As the court below repeatedly acknowledged, a state's restriction on a defendant's right to present evidence may not rise to constitutional error if the evidence is immaterial, unimportant, untrustworthy, repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion, or if the defendant fails to make a plausible showing of how the testimony would have been both material and favorable to his defense. As such, the Ninth Circuit's articulation of when a state court may exclude evidence of a third-party suspect is completely in line with the rationale put forth by the circuit cases upon which the State relies. Indeed, while factually inapposite, the circuit cases cited above are nonetheless legally supportive of the decision of the Ninth Circuit in the instant case. There is no split among the Circuits on the issues presented.[3]

---

[3] The State's second presented issue in its petition for writ of certiorari refers to a state court's exclusion of "speculative *and untrustworthy*" hearsay evidence of a third party's guilt. [Pet. p. i] (Emphasis added). Clearly, there was no finding by either the trial court or the Ninth Circuit that Roundy's statements were in any way "untrustworthy." To the contrary, the trial court did not analyze the Roundy statements to see if they bore particularized guarantees of trustworthiness in its Rule 803(24) analysis. And, as the Ninth Circuit noted:

> . . . Roundy's statements had the same situational attributes as the Betty Gray statements admitted as trustworthy – a fearful state of mind, no other way to introduce the statements, adequate detail, and repetition of similar statements to several people. [Pet'r App. p. 30]
>
> Roundy appeared to have no more motive to fabricate her statements than did Betty Gray, and Roundy, like Betty

(Continued on following page)

### C. The Opinion Below Will Not Work A Hardship On The State Courts.

The State claims that the decision below will work a hardship on state judicial systems because it "brings virtually all evidentiary rulings by state courts that exclude evidence offered by a criminal defendant under the umbrella of constitutional scrutiny because it elevates the question of whether a trial court consistently applied evidentiary rules to constitutional significance." [Pet. p. 6]. The State's concern lies somewhere between the boundary of white elephant and red herring. It suffices to say that the only state courts that will be troubled by the decision below are those which violate the Sixth and Fourteenth Amendments to the federal constitution by arbitrarily limiting a defendant's right to present a defense. There is nothing novel in this regard in the Ninth Circuit's opinion.

---

> Gray, repeated the statements to several different people. Like Betty Gray's, Roundy's factual statements were coupled with expressions of fear, so it appears Roundy, like Betty Gray, was frightened when she made these statements of fact. [Pet'r App. p. 32]
>
> Moreover, the prosecution *conceded* that Roundy made these statements to which the witnesses were prepared to testify, stating: "I want to make it clear, I'm not suggesting [the witnesses] are making this up. . . . I've talked to these people. And yeah, these statements were made." (Emphasis original).

[Pet'r App. p. 31] On this record, the Ninth Circuit concluded that Roundy's statements "fared well" with the Betty Gray statements admitted as trustworthy under Rule 803(24) when analyzed using the same criteria which the trial court applied in its analysis of Betty Gray's statements. [Pet'r App. p. 32] As such, the State's second presented issue does not accurately reflect the record before the Court. This is an additional reason for the Court to deny the writ as to this issue.

The Ninth Circuit has not changed the constitutional analysis of this Court. It has simply applied that analysis to the facts of this case.

The State's argument should be seen for what it is. Namely, an effort to thwart federal habeas review of state evidentiary rulings on the grounds that the review itself is outside the scope of habeas jurisdiction. Such a position is contrary to this Court's habeas jurisprudence and would effectively bar federal review of evidentiary rulings regardless of the degree of harm done to a defendant's right to due process of law and his right to present his defense, and would effectively render those rights a nullity.

## CONCLUSION

The Ninth's Circuit decision falls squarely within the main of the Court's habeas jurisprudence regarding the arbitrary application of evidentiary rules with resultant injury to the Due Process Clause of the Fourteenth Amendment and the Compulsory Service Clause of the Sixth Amendment. It represents neither an expansion of habeas jurisdiction, nor a split of authority among the federal circuit courts. The asymmetrical application of evidentiary standards was an arbitrary act that denied Gray his right to present a defense. The writ of habeas

corpus was providently granted, and the petition for writ of certiorari should be denied.

Respectfully submitted,

MAYNARD D. GRANT
*Counsel of Record*

GRANT & NEWCOMB LLC
PMB 150
3213 W. Wheeler Street
Seattle, Washington 98199
(206) 286-0121

*Counsel for Respondent*
*William L. Gray*